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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 810

CONSOLIDATED FREIGHTWAYS, INC.
(a corporation),
Petitioner,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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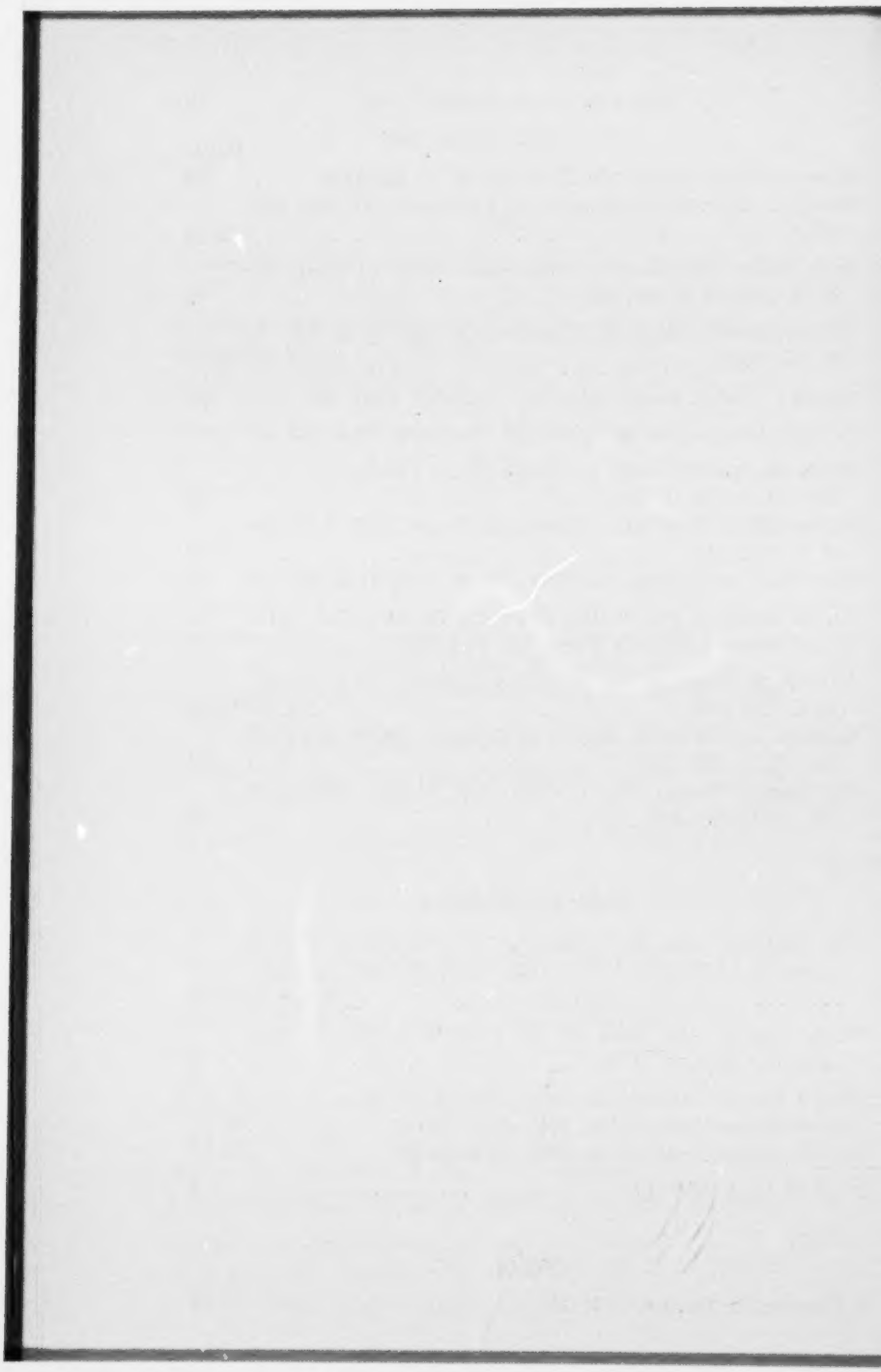

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No.

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(a corporation),
Petitioner,

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THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Consolidated Freightways, Inc. prays that a writ of certiorari issue to review the deci-

sion of the Supreme Court of the State of California, rendered in the above cause on October 14, 1940, in which decision, the Court affirmed an order of respondent, The Railroad Commission of the State of California made against petitioner on July 3, 1940.

STATEMENT OF FACTS.

The facts involved are undisputed. Briefly summarized they are as follows:

Petitioner, a Washington corporation, is engaged in the business of operating, under regulation of the Interstate Commerce Commission, a motor carrier transportation system for freight only throughout eight Western states, namely: California, Oregon, Washington, Nevada, Idaho, Montana, North Dakota and Minnesota. In California petitioner's business and operations are confined strictly and exclusively to the transportation and handling of freight in interstate commerce. (R. 1.)

In conjunction with the operation of your petitioner's motor freight lines, it operates a pool-car distribution service from certain of its stations upon its lines. (R. 4.) In San Francisco the service is operated as follows: An Eastern shipper, having a number of lots of freight for various consignees in and near San Francisco, consolidates the various lots into one "pool car" shipment and forwards same to petitioner in San Francisco by a rail or water carrier. (R. 4.) The shipper then sends to petitioner written directions for distribution of the various lots from the pool car. Petitioner receives the pool car in San Francisco and distributes the various lots in the

"pool car" to their respective consignees according to the written instructions received from the out-of-state shipper. (R. 5.) The various lots consigned to consignees in San Francisco are delivered by petitioner in its own equipment to them. Where the ultimate consignee of a lot is beyond San Francisco petitioner either delivers same upon its own lines or gives it to another carrier for delivery. (R. 4.) There is no connection between petitioner and the carrier of the "pool car" either by way of joint tariff, management or ownership. (R. 5.)

For this distribution service petitioner makes a charge to the shipper according to rates filed, as required, with the Interstate Commerce Commission. (R. 3.) The tariff covers cost of labor for unloading, segregating, billing, reloading and delivery of the various lots when such delivery is within San Francisco. (R. 3.) When delivery to the ultimate consignee is beyond San Francisco the charge of the other carrier for such delivery is added, but the same charge for the distribution service by petitioner is made to the shipper. The normal charge for distribution is ten cents per hundred pounds, regardless of commodity, with a few minor exceptions. The distribution charges of petitioner in San Francisco are uniformly the same as those charges at its other 58 points of distribution throughout its transportation system in California and the other seven states. (R. 3.) Among petitioner's distribution points that enjoy the uniformity of rate are San Francisco, Calif.; Portland, Oregon; and Tacoma and Seattle, Washington. (R. 3.)

After a public hearing the respondent, acting under authority of the *City Carriers' Act,* Calif. Statutes of 1935, Chap. 312, as amended (Act 5134, Vol. 1, Gen. Laws of Calif., page 2128) ordered petitioner to cease and desist and hereafter abstain from charging and collecting for transportation, as a city carrier, rates less than the applicable minimum, lawful rates established by order of respondent. (R. 12.)

Respondent concedes that its order does not apply to delivery of freight received from "pool cars" of other carriers to consignees beyond the city limits or to freight which comes into the state on petitioner's own freight line and is delivered to a consignee either in or beyond the city. (R. 4, 11.)

The charges for the aforementioned service which respondent established is higher to varying degrees, than the charges being made by your petitioner in accordance with its rates and tariffs now filed with the Interstate Commerce Commission. Respondent's minimum rates vary on an involved sliding scale depending upon the character of traffic handled and its quantity. Where large shipments of low rated commodities are involved petitioner's rates and respondent's minimum rates are approximately the same, and when smaller quantities of high rated commodities are involved respondent's minimum rates are correspondingly greater. (R. 3.)

No evidence was offered nor findings made to show that petitioner's distribution charges were unreasonably low or below actual cost and a fair profit, and

likewise no evidence was offered or findings made to show that the minimum charges established by respondent were excessive. The reasonableness or necessity for either the petitioner's rates or respondent's minimum rates were not an issue at the hearing. (R. 4.)

OPINIONS BELOW.

In making its order respondent rendered an opinion (R. 9) reported in Vol. 42, Opinions and Orders of the Railroad Commission of Calif. at page 721.

No opinion whatsoever was rendered by the Supreme Court of the State of California in denying petitioner's petition for writ of review. This in spite of fact that one justice of the State Court voted for granting the writ of review (R. 19) and two justices voted for granting a rehearing. (R. 22.)

THIS COURT HAS JURISDICTION.

The Supreme Court of the United States has jurisdiction to review the cause herein by reason of the following facts and law:

(a) Section 237 of the U. S. Judicial Code, as amended (Title 28, U. S. C. A. 344 (b)) expressly confers jurisdiction.

(b) This cause directly involves the validity of the City Carriers' Act, Calif. Statutes of 1935, Ch. 312, as amended (Act 5134, Vol. 1, Calif. Gen. Laws,

page 2128), as applied to petitioner's interstate commerce operations. The City Carriers' Act is the authority under which respondent seeks to regulate petitioner's rates. The preamble of the Act is as follows:

> "The use of the public highways for the transportation of property for compensation is a business affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public."

The only portion of the Act pertaining to regulation of rates are Sections 9 and 10 thereof which read as follows:

> "9. *Fixation of rates: Charging of lesser rate forbidden.* The Railroad Commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any carrier subject to this act.

"In establishing or approving such rates the commission shall take into account and give due and reasonable consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation services performed, or to be performed, or of any accessorial service and the value of the commodity transported and the value of the facility reasonably necessary to perform such transportation service.

"It shall be unlawful for any carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this section.

"The commission shall make such rules and regulations as may be necessary to the application of the rates established or approved under the provisions of this act.

"10. *Authorization of rates less than the minimum.* If any carrier hereunder desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable and consistent with the public interest, authorize such rates less than the minimum rates established in accordance with the provisions of section 9 hereof."

The Act also provides in Section 21 thereof:

"21. *Act not a regulation of interstate commerce.* Neither this act nor any provision hereof shall apply to or be construed as a regulation of commerce with foreign Nations or among the several States, except in so far as the same may

be permitted under the provisions of the Constitution and the acts of Congress of the United States."

(c) The judgment herein sought to be reviewed was rendered by the Supreme Court of the State of California on October 14, 1940. (R. 19.) Petitioner's petition for rehearing before the State Supreme Court was duly filed and denied November 7, 1940. (R. 22.) This petition for writ of certiorari is being filed within the time allowed by law as duly extended to March 7, 1941 by a justice of this Court. (R. 24.)

(d) The points of law herein urged for granting a writ of certiorari, and hereinafter particularly set forth on page ten of this petition under heading "Questions Presented" were each and all raised before respondent by written briefs; before respondent in petition for rehearing (R. 6); before the Supreme Court of the State of California in petition for writ of review (R. 7) and before the same Court in petition for rehearing of petition for writ of review. (R. 19.)

The questions were properly raised before respondent and the highest Court in the state.

Secs. 66 and 67, *Public Utility Act,* Act 6386 in Vol. 2 Gen. Laws of Calif., page 3174.

The questions having all been raised before the State Supreme Court in the petition for writ of review it must be assumed that the Court passed upon same adversely to petitioner as denial of said petition without an opinion constitutes an affirmance of respond-

ent's order and a favorable determination of any one question would have required a reversal. Furthermore, all were federal questions.

Napa Valley Electric Co. v. Railroad Comm. of Calif., 251 U. S. 366, 64 L. Ed. 310.

(e) The federal questions herein presented are substantial for the following reasons:

The question concerning validity of the state regulation of freight rates of petitioner in view of the commerce clause of the Federal Constitution was determined by the State Court herein contrary to *Ohio Railroad Comm. v. Worthington,* 225 U.S. 101, 56 L. Ed. 1004, a decision of this Court upon facts essentially the same as the case at bar. Whether fact that carrier operates wholly within state and is not owned or managed by a line-haul carrier, permits state to invade the otherwise exclusive power of Congress is certainly substantial. Whether the direct burden upon interstate commerce of freight rate regulation by the state can be justified under the "local concern" doctrine is substantial as the numerous decisions upholding that doctrine upon which respondent relies pertains to use and safety of public highways. Petitioner's rates have no relation to such.

Whether the California City Carriers' Act and respondent's order are justified under police power of the state is an open and substantial question for reason that the case of *Morel v. Railroad Commission of California,* 11 Cal. (2d) 488, which held that the City Carriers' Act was within the police power of the

state is contrary to *Frost v. Railroad Commission of California,* 271 U. S. 583, 70 L. Ed. 1101, although the state Court in the former case attempted to distinguish the two cases. Also the case of *Morel v. Railroad Commission,* 11 Cal. (2d) 488, did not gauge the police power of the state when applied to interstate commerce. In the later situation the police power of the state is more restricted than otherwise.

Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 35 L. Ed. 649.

Whether the various burdens imposed upon the operations of petitioner's business by respondent's order violates the 14th amendment to the Federal Constitution is real and substantial in the light of *Frost v. Railroad Commission of California,* 271 U. S. 583, 70 L. Ed. 1101, and other decisions by this Court.

QUESTIONS PRESENTED.

I.

Petitioner, as a part of a movement of freight in interstate commerce, handles and transports the freight wholly within the City of San Francisco from a "pool car" of another carrier to the ultimate consignee of the freight, under directions of the out-of-state shipper and makes a fixed charge for the service according to its tariffs filed with the Interstate Commerce Commission.

Is it not prejudicial error for the state Court to refuse to declare an order of the state railroad com-

mission which seeks to regulate petitioner's charges for the aforesaid service, void and unconstitutional as being in violation of the commerce clause (Art. 1, Sec. 8, Cl. 3) of the Federal Constitution? This upon the theory that regulation of freight rates is a direct regulation of a subject matter of interstate commerce that is of national concern, admitting only of national regulation, if at all, and that being such, the power to regulate rests exclusively in Congress with the result that the state cannot assume jurisdiction to regulate even assuming that Congress has not acted upon the subject. Also on the theory that respondent's regulation exposes interstate commerce to risk of multiple burdens which the commerce clause of the Constitution is designed to prevent.

II.

Is not the order of a state railroad commission unconstitutional as being beyond the police power of the state as conferred upon it by the tenth amendment of the Federal Constitution, where:

(1) the order attempts to regulate rates of an interstate carrier charged by the carrier to cover "cost of labor for unloading, segregating, billing, reloading and delivery" of freight received from another carrier in the City of San Francisco and delivered to the ultimate consignee also in San Francisco; (2) where it appears the rate sought to be regulated constitutes primarily a charge for handling the freight at its depot and incidentally the transportation of freight

upon the city streets; (3) where there exists no rational justification for the regulation as a measure to conserve or protect the use and safety of the public highways and the primary purpose of the order is to control the business and competitive conditions of petitioner; and (4) where it does not affirmatively appear that such regulation is necessary to insure adequate and dependable service by all necessary transportation agencies in the city or state?

III.

Does not an order of a state railroad commission take petitioner's property without due process of law and deprive petitioner of the equal protection of law in violation of the 14th amendment to the Federal Constitution where the effect of the order and statute is to:

(a) Destroy petitioner's uniformity of rates now existing at its 58 distributing points throughout eight states and which uniform rate is filed with the Interstate Commerce Commission?

(b) Prohibit petitioner to operate in San Francisco as a carrier of interstate commerce unless it first assumes the status of a "city carrier" and consents to be regulated as such when in fact it is not a "city carrier" and cannot do intrastate business in California like other city carriers?

(c) Permit petitioner's competitors performing the same function, who happen to be owned by a rail

line-haul carrier to continue without regulation by the state while petitioner which is not owned or controlled by a rail line-haul carrier must be regulated by the state under a misfit status of a "city carrier"?

(d) Require petitioner to charge one rate which it has filed with the interstate commerce commission for handling "pool car" distributions where the ultimate consignee of the freight is beyond the city limits and a different and higher rate for the identical service, as imposed by the state, where the ultimate consignee is within the city?

REASONS FOR GRANTING WRIT OF CERTIORARI.

This Court should grant petitioner a writ of certiorari for the following reasons:

(1) In respect to the question of the state through respondent's order and the City Carriers' Act imposing a direct and unlawful burden upon interstate commerce in violation of the commerce clause of the Federal Constitution the California Supreme Court has decided this substantial federal question contrary to *Ohio Railroad Comm. v. Worthington,* 225 U.S. 101, 56 L. Ed. 1004, a decision of this Court based upon the same essential facts as in the case at bar, and contrary to principles of law determined in many other decisions of this Court. The doctrine of "local concern" being the only possible justification of respondent's order not violating the commerce clause, is generally known and established. However, the doctrine

has been almost universally applied to those state interferences with interstate commerce which but indirectly affects the commerce or which only affects one of its instrumentalities. Furthermore, decisions of this Court have held that freight rates are so essentially and directly a part of interstate commerce that regulation of them is of national concern and any regulation by the state is such a direct burden upon interstate commerce as to be in violation of the commerce clause of the United States Constitution. See: *Wabash, St. Louis & Pac. Ry. Co. v. Illinois,* 118 U. S. 557, 30 L. Ed. 244, and other cases cited in petitioner's supporting brief.

Not only does respondent's order cast a direct burden upon interstate commerce but it exposes interstate commerce to the risk of "multiple burdens" which places it at a competitive disadvantage with local commerce. Such violates the commerce clause of the Constitution and causes the state Court's decision to be contrary to the decision of this Court. See: *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365 and other decisions cited on page 26 of petitioner's supporting brief.

(2) The decision of the state Court which in effect held that the state was justified under its police power to regulate petitioner's freight rates is contrary to the language in *Frost v. Railroad Commission of California,* 271 U. S. 583, 70 L. Ed. 1101, where interstate commerce was not even involved. Considering the state's police power restricted when it is impressed upon interstate commerce the respondent clearly did

not have the police power to make the order in question. In this respect the state Court's decision is contrary to *Crutcher v. Commonwealth of Kentucky,* 141 U. S. 47, 35 L. Ed. 649.

(3) The decision of the state Court in this case which affirms the power of respondent as a condition to carrying on its interstate commerce to assume the status of a city carrier and to be regulated as such when petitioner is not in fact a city carrier is analogous to the situation where this very same respondent attempted to impose the conditions of a "common carrier" upon a "private carrier" and where in the later situation this Court in *Frost v. Railroad Commission of California,* 271 U. S. 583, 70 L. Ed. 1101, held that respondent took property without due process of law in violation of the 14th amendment of the Federal Constitution.

(4) The federal questions herein presented are of extreme importance not only to petitioner but to the many other motor carriers engaged in interstate commerce. The questions could have been put to rest by the California Supreme Court but were not because it did not see fit to render an opinion. Unless this Court makes a final and adequate determination of the right of the various states to encroach upon the commercial concerns of interstate commerce in attempting to regulate freight rates such as respondent is doing in the case at bar, petitioner in the other seven states in which it operates, and for that matter other carriers in other states, are likely to be litigating this very same question for years to come.

Unless the decision of the California Supreme Court is reversed petitioner in respect to its charges for handling "pool car" distributions will be subjected to two regulatory bodies, i. e., the state when freight is delivered to a party in San Francisco; the Interstate Commerce Commission when freight is delivered elsewhere in California or beyond the state border. Also, the uniform rate which petitioner has been charging throughout its almost nation-wide system will be destroyed. The result will be that petitioner's operations will become inefficient and hampered and its customers exasperatingly confused.

Wherefore petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California, commanding that Court to certify and send to this Court for its review and determination a transcript of the record and proceedings of said Court in the case between the parties hereto and numbered in its docket as "S. F. No. 16,482", and that the judgment of said Court be reversed by this Court, and for such other relief as to this Court appears to be proper.

Dated, San Francisco, California,
March 3, 1941.

CONSOLIDATED FREIGHTWAYS, INC.,
Petitioner.

HERBERT W. ERSKINE,
DONALD A. SCHAFER,
WILLIAM FARNUM WHITE,
Counsel for Petitioner.

PETITIONER'S

BRIEF

In the Supreme Court
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OCTOBER TERM, 1940

No.

CONSOLIDATED FREIGHTWAYS, INC.
(a corporation),
Petitioner,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent's order violates the commerce clause of the Federal Constitution as the subject of regulation is a matter of "national" and not "local" concern.

The commerce clause of the federal constitution (Art. 1, Sec. 8, Cl. 3) by its own force places the power to regulate rates of interstate commerce exclusively in Congress. The state, even in absence of Congressional action, has not the power to regulate such tariffs. This is because the subject of charges to shippers of goods

in interstate commerce is of national concern, admitting only of uniform regulation, if at all. Only matters of a strictly local nature pertaining to interstate commerce may be burdened by state legislation.

On the essential facts the case of *Ohio Railroad Commission v. Worthington,* 225 U. S. 101, 56 L. Ed. 1004, is identical to the case at bar. In that case, a railroad transported coal from a mine in Ohio to Port Huron, also in Ohio, from where the railroad loaded the coal upon a vessel which took the coal out of the state. The shipper of the coal arranged independently for the vessel to pick up the coal from the railroad at Huron. There was no common arrangement, control or ownership between the rail carrier and the water carrier. The railroad, though engaged in interstate commerce, operated wholly within the state.

The rate which the Ohio Railroad Commission attempted to regulate covered: "in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels". The shipper of the coal did not use a "through bill" but consigned the coal to himself at Huron or to a nominal party.

The U. S. Circuit Court for the Northern District of Ohio permanently enjoined the State of Ohio from imposing the regulation of the rate on the ground it was a regulation of interstate commerce. This Court in affirming the decree of the Circuit Court said in an opinion rendered by Mr. Justice Day:

> "It is not necessary to review the cases in this court which have settled beyond peradventure that

the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void. *Louisville & N. R. Co. v. Eubank,* 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. Rep. 227. And an order made by a state commission under assumed authority of the state, which directly burdens or regulates interstate commerce, will be enjoined. *McNeill v. Southern R. Co.,* 202 U. S. 543, 50 L. Ed. 1145, 26 Sup. Ct. Rep. 722."

In that case the State of Ohio argued that the Interstate Commerce Commission had not taken jurisdiction of the matter as Section 1 of the act to regulate commerce made the provisions of the act inapplicable to transportation wholly within the state as well as to rail and water transportation where both the rail and water carrier are not under "a common control, management, or arrangement for a continuous carriage or shipment" and that therefore the State had jurisdiction to regulate the subject.

To which the Court replied:

"It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority."

"We therefore reach the conclusion that, under the facts shown in this case, the Railroad Commission, in fixing the rate described, attempted to

> directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined."

The case of *Wilmington Transp. Co. v. Calif. R.R. Comm.*, 236 U. S. 151, 59 L. Ed. 508, not only failed to overrule the foregoing *"Worthington"* case but, inferentially affirmed it. In that case which held that respondent herein could regulate rates in transportation to Catalina Island, a part of California, Mr. Justice Hughes said (at page 517 L. Ed.):

> "We are not here dealing with the case of property which is in course of continuous transportation to another state or to a foreign country. * * * (citing *Railroad Comm. v. Worthington,* 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. Rep. 653, and other cases) * * * It must be assumed upon this record that the state claims the right to exercise its authority only as to transportation between the mainland and the island, and *solely with respect to such shipments over this route as are local to the state, both as to the beginning and the end of the transportation."* (Italics ours.)

No decision of this Court has expressly or otherwise overruled the *"Worthington"* case, supra, and it stands today as the controlling law upon the facts as therein presented; facts which are the same as in the case at bar.

Previous to the foregoing case this Court put to rest the question of the power of the state to regulate interstate commerce rates in, *Wabash, St. Louis & Pacific*

Ry. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 244. This Court concluded an exhaustive opinion by saying:

> "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."

Rate making falls within the exclusive power of Congress over interstate commerce because it is national in character and admits of only one uniform system.

Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678;

Railroad Company v. Maryland, 21 Wall. 456, 470, 22 L. Ed. 678;

Glouchester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158;

Covington Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962;

9 *Harvard L. Review,* 324, 336.

It is apparent that regulation of interstate commerce rates, if they are to be regulated at all, must be uniform, not only as to criteria for arriving at the charge, but also uniform in the sense that only one governmental body need be looked to for such regulation. The commerce clause of the Federal Constitution intends, and does put the *power* to regulate the commercial, economic and business concerns of interstate commerce *exclusively* in Congress or its delegated authority.

Respondent's order is invalid because it casts a DIRECT burden upon interstate commerce.

The State's imposition of a burden upon interstate commerce can only be justified under the "local concern" doctrine when the burden is cast as an incident to the exercise of one of the State's otherwise lawful powers, and then only when it restrains an instrumentality of such commerce.

In the case at bar, respondent's order casts a *direct* burden upon both the shippers of interstate commerce and the commerce itself, as distinguished from a burden upon the carrier, which would be indirect or incidental to the shipper or commerce itself. This characteristic is fatal to the validity of the respondent's order. In *The Minnesota Rate Cases,* 230 U. S. 352, 396, 57 L. Ed. 1511, Mr. Justice Hughes in the opinion of the Court said (p. 1540 L. Ed.):

> "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of federal authority touching the interstate rates said to be affected." (Italics by the Court.)

In holding invalid a state law fixing the minimum resale price for milk brought into the state the late Mr. Justice Cardozo said in *Baldwin v. Seelig* (1935), 294 U. S. 511, 79 L. Ed. 1032 (p. 1037 L. Ed.):

"It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. *International Text Book Co. v. Pigg,* 217 U. S. 91, 112, 54 L. Ed. 678, 687, 30 S. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and see *Brennan v. Titusville,* 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; *Brown v. Houston,* 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091; *Webber v. Virginia,* 103 U. S. 344, 351, 26 L. Ed. 565, 567; *Kansas City S. R. Co. v. Kaw Valley Drainage Dist.,* 233 U. S. 75, 79, 58 L. Ed. 857, 859, 34 S. Ct. 564. * * *"

In the case of *Carter v. Carter Coal Co.* (1936), 298 U. S. 238, 80 L. Ed. 1160, Mr. Justice Sutherland in rendering the opinion of the court pointed out that the distinction between a "direct" and "indirect" burden upon interstate commerce was in the *relationship* of the cause and effect and not the *magnitude* of either. He said (p. 1187, L. Ed.):

"The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question

here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?" (Italics by the Court.)

As was said by this Court in *Schechter Poultry Corp. v. United States* (1935), 295 U. S. 495, 79 L. Ed. 1570, and reiterated in *Carter v. Carter Coal Co.*, supra (80 L. Ed. p. 1187):

> "* * * the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

Nothing could more *directly* burden interstate commerce than respondent's order regulating petitioner's rates as in the case at bar.

The order of respondent is invalid as it exposes interstate commerce to risk of "multiple burdens" and thus places it at a competitive disadvantage.

Even if it be assumed that respondent applies the rate regulation under the City Carriers' Act with fairness, equality and non-discrimination to all transportation in San Francisco—intracity and interstate, such attempted regulation places the interstate commerce of petitioner at a competitive disadvantage with the intracity commerce under the well established theory that such regulation by respondent exposes petioner's interstate commerce to the risk of multiple burdens.

If the State of California has power to raise the cost of transporting a commodity when it is within the state in the course of interstate transit, so has every other state through which the commodity must pass. The risk of bearing such multiple regulations, whether consummated or not, creates a burden which interstate commerce must bear while local commerce need not. Petitioner's interstate commerce is protected from such competitive disadvantage by the commerce clause of the Federal Constitution.

This Court has most recently expressed the "multiple burden" doctrine in cases where the state has sought to directly tax interstate commerce.

Thus, in declaring invalid a state income tax upon the "gross receipts" of interstate commerce, Mr. Justice Roberts in rendering the opinion of the Court said in *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365 (at p. 1369, L. Ed.):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. *Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution.*

> "The opinion of the State Supreme Court stresses the generality and *nondiscriminatory character of the exaction* but it is settled that this *will not save the tax if it directly burdens interstate commerce.*" (Italics ours.)

See:

Gwin, White & Prince v. Henneford (1939), 305 U. S. 434, 83 L. Ed. 272;

Western Live Stock v. Bureau of Revenue (1937), 303 U. S. 250, 82 L. Ed. 823;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 80 L. Ed. 956;

State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. Ed. 146.

There is no essential difference between a state imposing a tax upon interstate commerce or regulating the rates for such commerce, so far as the character of the burden upon such commerce is concerned.

Mr. Justice Miller in *Wabash, St. Louis & Pac. Ry. Co. v. Illinois,* supra, regarded state regulation of interstate commerce rates as analogous to a state adding a tax on interstate commerce passing through the state. He said:

> "It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation. * * *"

Petitioner passes on to its out-of-state shipper the higher transportation rate which respondent by its

order in the case at bar establishes. If respondent instead of raising the rates, had exacted a tax upon the commodities transported by petitioner in interstate commerce such would likewise be passed on to the out-of-state shipper. It thus is apparent that the risk of stifling interstate commerce through multiple rate increases brought about by several states each seeking to put interstate rates on a parity with their respective intrastate rates is just as real as the risk of exposing interstate commerce to multiple taxation through the action of several states taxing the same commerce in an effort to have intrastate and interstate commerce bear an equal tax burden. It must follow, that if a direct tax upon interstate commerce is prohibited by the commerce clause of the Constitution because of its effect in exposing interstate commerce to the risk of multiple burdens, so must a direct regulation of the transportation rates likewise be prohibited.

In the tax cases the "multiple burden" doctrine has sometimes been criticized on the ground that it permits interstate commerce to be relieved of its fair share of the obligation to support the state government to the prejudice of intrastate commerce which must do so. Such objection, if made in the case at bar, would be unsound for the reason that rate regulation, although as direct and burdensome to interstate commerce as direct taxation, does not exempt the interstate commerce from any obligation to confer a tax benefit upon the state government. The most that interstate commerce would be freed from is state regu-

lation of rates which in no way deprives the state of a benefit or casts an increased burden by reason of such exemption upon intrastate commerce.

It is common knowledge that if respondent's jurisdiction to regulate petitioner's rates is upheld, respondent will then have the power to raise the San Francisco "pool car" distribution rates to a point where the economic advantage of "pool car" distribution will give way to distribution by local wholesalers. Such would clearly be unlawful on the sole ground of discrimination.

Hall v. De Cuir, 95 U. S. 485, 497, 24 L. Ed. 547, 551;

Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 498, 31 L. Ed. 700;

Cooley v. Port Wardens, 12 How. 299, 315, 13 L. Ed. 996, 1003.

Although respondent's rate order may not now actually discriminate against interstate commerce it does open the way for other states to impose increased rates upon the same commerce for other segments of the interstate journey. As we have shown in the tax cases, a multiplication of non-discriminatory burdens create in their aggregate a burden that actually discriminates against interstate commerce.

Pool car distribution services such as petitioner operates survive only as long as there is a slight economic advantage over distribution through local wholesalers and intracity carriers. Increased transportation costs to the out-of-state shipper, brought about by various states meddling with interstate trans-

portation rates will spell disaster for petitioner's business by diverting it to other channels. This is the danger to which petitioner is exposed by reason of respondent's order. It is not for the State of California under guise of highway conservation or for any other reason, to upset this delicate economic balance between two methods of interstate transportation.

Certainly the founders of our Constitution never intended that the commerce clause would be so feebly construed as to give to the states any such power to regulate the economics of interstate transportation.

There can be no question that petitioner's "pool car" distribution operation, wholly within the state, constitutes an operation in interstate commerce, which is subject to constitutional protection, as much as if petitioner carried the freight across a state line.

United States v. Erie R. Co., 280 U. S. 98, 74 L. Ed. 187;

Southern Pac. Terminal v. Interstate Comm., 219 U.S. 498, 55 L. Ed. 310;

Powell v. United States (4th Cir.), 112 Fed. (2d) 766;

United States v. Illinois Term, 168 Fed. 546;

Galveston Truck Line Corp. v. Allen, 2 Fed. Supp. 488;

Meyers v. Railroad Comm. of Calif., 218 Cal. 316.

In short, respondent's attempt to regulate petitioner's rates goes to the very heart of interstate commerce by reason of its character and directness. This

violates the commerce clause of the United States Constitution without even considering the existence of applicable Federal legislation.

City Carriers' Act is beyond police power of state when applied to regulation of rates in interstate commerce.

The scope of the state's police power becomes more restricted when it seeks to burden interstate commerce. This is made clear in *Crutcher v. Commonwealth of Kentucky,* 141 U. S. 47, 35 L. Ed. 649, where this Court held a state law invalid which required a foreign corporation engaged in interstate commerce to submit to financial conditions and regulations imposed by the state. In this case the Court said:

> "But the main argument in support of the decision of the court of appeals is that the Act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the Legislature of a state may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. * * * There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the State * * *
>
> "But whilst it is only such things as are clearly injurious to the lives and health of the people

> that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the State extends to almost everything within its borders * * *"

It is inconceivable that regulation of petitioner's rates is necessary to protect the lives and health of the people. Therefore, the exclusive power of Congress over interstate commerce is paramount to the regulation herein attempted, even assuming it would otherwise be a valid exercise of the state's police power.

Petitioner's distribution charges, which the State through respondent's order and City Carriers' Act seeks to control, pertain primarily to a charge for unloading, segregating, billing and reloading freight in interstate commerce and but partially concerns its transportation upon the city streets. At most, regulation of petitioner's rates but indirectly and slightly affects the *business* of competing carriers. Regulation of its rates clearly cannot and does not affect or reasonably pertain to the use, conservation, safety or avoidance of congestion upon the city streets. For this reason alone the order of respondent is invalid as being beyond the police power of the state as reserved to it by the 10th Amendment to the Federal Constitution.

To become valid respondent's regulation must in a real sense pertain to the use of the public highways. Its validity cannot be justified upon regulation

of the competitive conditions of petitioner or other carriers. Such was declared unlawful in *Frost v. Railroad Commission of California,* 271 U. S. 583, 70 L. Ed. 1101, where this Court in invalidating the attempt of respondent herein to impose the regulations of a "common carrier" upon a "private" carrier said:

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect is the view of the court below plainly expressed. 197 Cal. 230, 240 Pac. 26."

Before it could even be argued that control of business conditions could justify regulation of petitioner's rates it would have to affirmatively appear as a fact that "adequate and dependable service by all necessary transportation agencies" was endangered unless petitioner raised its rates. (See preamble to *City Carriers' Act,* herein page 6.) Such contention if made would be far fetched in view of the fact that petitioner does not solicit or handle any intra-city business.

When the State of North Dakota attempted by legislation to control the profits of dealers on the interstate grain market, this Court in declaring such legislation unconstitutional in *Lemke v. Farmers' Grain Co.,* 258 U. S. 50, 66 L. Ed. 458, said:

"It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the state to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states.

"This principle has no application where the state passes the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it. This court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases. * * *

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and *provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce.*" (Italics ours.)

Dickerson v. New Jersey State Dept. of Weighing (D. Ct. N. J. 1940), 33 Fed. Supp. 431.

In *Meyers v. Railroad Commission of Calif.*, 218 Cal. 316, the California Supreme Court said:

"A state may enact reasonable police regulations to govern the local operations of instrumentalities engaged in interstate commerce but may not, under the guise of police regulations, place undue and unreasonable burdens upon interstate commerce."

The State of Washington sought to require inter-state motor carriers to carry liability insurance for its passengers (not public) and such was declared to be beyond the state's police power as well as unlawful burden upon interstate commerce in *Cobb v. Dept. of Public Works* (Wash., 1932), 60 Fed. (2d) 631.

Where state legislation is primarily designed to regulate interstate business and but secondarily designed to promote highway protection it becomes unconstitutional.

Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed 623;

Bush & Sons Co. v. Maloy, 267 U. S. 317;

Commonwealth v. Kentucky, 129 Pa. Sup. 149 195 Atl. 771.

Police power is only available to promote welfare of public; not welfare of individuals.

Binford v. Boyd, 178 Cal. 458, 461.

Application of City Carriers' Act to petitioner takes its property without due process and without equal protection of law, contrary to 14th Amendment of U. S. Constitution.

Respondent's order applying rate regulation provisions of City Carriers' Act, supra, takes petitioner's property without just compensation and does not afford it equal protection of law in violation of the 14th Amendment to the United States Constitution.

In effect respondent is compelling petitioner, who is engaged exclusively in transporting goods in interstate commerce, to be classified as and assume the burden of a city carrier. Petitioner is not a city carrier

While it operates on the city streets it cannot and does not pick up and deliver intra-city traffic as city carriers do. It uses the same equipment and personnel for delivering "pool car" freight as it does for other interstate freight coming in upon its own lines. It solicits "pool car" distributing business wholly beyond the state and solicits no city traffic in San Francisco. It is not in direct competition with city carriers and it would be an unfair and unlawful burden upon petitioner to impose tariffs made for city carriers upon petitioner.

On principle it is as unlawful for respondent to make petitioner become a city carrier against its will as it is for respondent to make a private carrier become a common carrier against its will, as a condition for permit to use the city streets.

The latter was declared unconstitutional in *Frost v. Railroad Commission of Calif.*, 271 U.S. 583, 70 L. Ed. 1101; and *Michigan Pub. Utilities Com. v. Duke*, 266 U. S. 570, 69 L. Ed. 445.

Petitioner has a property right in its business which increases or decreases in value in direct ratio to its efficiency in operation. It regards uniformity of charges for its "pool car" distributing service as conducted at 58 of its distributing points upon its lines covering eight states, a valuable business asset both from view point of pleasing customers and conducting its operations quickly. For the same reasons it regards the ability to quote to customers and use only one tariff for its "pool car" distribution service at each of its points of operation, a distinct business asset.

If respondent's order is enforced it will mean that petitioner's uniform charge for distribution service throughout its system will be disrupted and destroyed. Furthermore, it will mean that when an Eastern shipper desires a quotation on distribution of a "pool car" at San Francisco he cannot look to the tariff now on file with the Interstate Commerce Commission but must first classify the many lots of freight that he contemplates shipping in the "pool car" to determine which go to consignees in San Francisco, and which to consignees in nearby cities or states. Then he must apply the Interstate Commerce Commission tariff to the latter and the California Railroad Commission tariff to the former. Although petitioner performs the same service in handling the distribution in both situations it charges a higher rate for local delivery and a lessor rate if the delivery happens to be elsewhere.

To add more to the shipper's confusion the tariff which respondent seeks to impress upon petitioner is more involved than the one petitioner is now using. In fact the examiner of respondent in making the order establishing the rates (referred to in the order in this case) said in respect to the rates he established:

> "I am not unmindful of the fact that the proposed schedule is in certain respects at variance with established tariff practices".

See: *C. R. C. Decision 28,632,* reported in Vol. 39 C. R. C. Rep. 665, 674.

Petitioner also has a property right to either engage freely in competition with other carriers of its class or

to be regulated by the same governmental body and under the same conditions as its most direct competitors. Respondent's order does not purport to apply to those carriers of interstate commerce that operate the same as petitioner, but happen to be owned by the line-haul carrier of the particular "pool car". Such motor carriers are among petitioner's direct competitors, yet they can operate freely, or under the Interstate Commerce Commission, while petitioner, to its irreparable business loss, must be regulated by respondent in a misfit status of a "city carrier" and subject to a different tariff made to fit a different class of carrier.

Petitioner contends that the foregoing, not only shows a taking of petitioner's property without any compensation (save an inconsequential increase in the San Francisco distribution charge), but that it also demonstrates the intolerable burden that respondent's order imposes directly upon interstate commerce.

RECAPITULATION.

1. Respondent's order regulating petitioner's charges for handling and distributing "pool car" freight imposes unlawful and direct burden upon interstate commerce in violation of the commerce clause of the United States Constitution. This because petitioner's rates are of "national" and not "local" concern, and exposes interstate commerce to the risk of "multiple burdens" to its competitive disadvantage.

2. Respondent's order is beyond the police power of the State in violation of the 10th Amendment to the

United States Constitution because it is not reasonably related to highway regulation, and imposes burden upon interstate commerce.

3. Respondent's order takes petitioner's property without due process of law and without equal protection of law in violation of the 14th Amendment to United States Constitution.

Accordingly, it is submitted that a writ of certiorari should be granted and the judgment of the Supreme Court of the State of California, affirming the order of respondent, be reversed.

Dated, San Francisco, California,
March 3, 1941.

Respectfully submitted,
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